

The National Agricultural
Law Center



University of Arkansas · System Division of Agriculture
NatAgLaw@uark.edu · (479) 575-7646

An Agricultural Law Research Article

**Florida's Private Property Rights Protection
Act: Does It Inordinately Burden the
Public Interest?**

by

Julian Conrad Juergensmeyer

Originally published in FLORIDA LAW REVIEW
48 FLA L. REV. 695 (1996)

www.NationalAgLawCenter.org

**FLORIDA'S PRIVATE PROPERTY RIGHTS
PROTECTION ACT: DOES IT INORDINATELY
BURDEN THE PUBLIC INTEREST?**

*Julian Conrad Juergensmeyer**

I.	APOLOGIA	695
II.	THE BERT J. HARRIS, JR., PRIVATE PROPERTY RIGHTS PROTECTION ACT	697
III.	WHY SHOULD THE FLORIDA LEGISLATURE LEGISLATE GREATER PROTECTION TO LANDOWNERS THAN THE COURTS GIVE THEM?	700
IV.	WHAT HATH THE FLORIDA LEGISLATURE WROUGHT	702
V.	INORDINATE BURDENS ON THE PUBLIC INTEREST	704
VI.	CONCLUSION	707

I. APOLOGIA

Justice Holmes made an unfortunate and precedent-violating analysis in *Pennsylvania Coal Co. v. Mahon*¹ that if regulation goes “too far”² it should be considered an exercise of the power of eminent domain.³ The analysis left the nature and extent of the land use control power so confused that it began a societal obsession with so-called regulatory takings.⁴

* Professor of Law, Gerald A. Sohn Research Scholar, and Affiliate Professor of Urban and Regional Planning at the University of Florida.

WARNING The author is a notorious “Regulatory Hawk” [or as he prefers to be called, a “Police Power Hawk.”] If you are offended by the ideas of such people, please read no further.

1. 260 U.S. 393 (1922).

2. *Id.* at 415.

3. *See id.* (“[I]f regulation goes too far it will be recognized as a taking.”).

4. This obsession is communicable and spread from the legal community to the public long ago. Many thousands of the discussions of it are located in popular magazines, newspapers, and even tabloids. Rumor has it that in some areas of the country there are bumper stickers on point but I have thus far been spared actually witnessing them.

In 1995, the obsession with regulatory takings gave birth to a misconceived attempt by the Florida Legislature to "clarify" takings tenets in the form of the Bert J. Harris, Jr., Private Property Rights Protection Act (Property Protection Act).⁵ Florida's new act purportedly enables land owners to avoid the quicksands of *regulatory takings* law by creating a new cause of action for governmental regulations which inordinately burden real property.⁶ In doing so, the act will create its own quagmire. Furthermore, this act seriously risks limiting the power of the State of Florida and its local governments to protect the environment. The government will have more difficulty planning for and regulating the use of land and thereby will be unable to properly manage the growth of the State.⁷ In short, the new act imposes an inordinate burden on the public interest.

What the world needs least is another article on the takings issue.⁸ Thousands of square miles of our nation have been deforested to provide the paper to print the thousands—probably hundreds of thousands—of books, articles, notes, comments, seminar papers, newsletters, etc., dealing with *regulatory takings*. I am proud that thus far in my soon to be forty years of writing on legal topics, I have played a minuscule role in the information explosion on takings. I have confined my comments largely to chapters of treatises where their presence is relatively innocuous.⁹ Only once have I succumbed to suggesting an "answer" to the takings dilemmas and even then my answer was written by another (and properly attributed to him).¹⁰

5. FLA. STAT. § 70.001 (1995).

6. FLA. STAT. § 70.001(1) (1995).

7. See FLA. STAT. § 70.001(2) (1995) (stating that when state action "inordinately burdened" the use of property, the owner is entitled to compensation).

8. The world probably did need one book on the subject and got it nearly 25 years ago when the Council on Environmental Quality commissioned Fred P. Bosselman, David L. Callies, and John Banta to do such a work. FRED. P. BOSSELMAN ET AL., *THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS* (1973). If the courts, especially the Supreme Court of the United States, had embraced the views contained therein, much agony, expense, and time could have been saved, and the meaningful issues in land use planning and control law could have been pursued more diligently. Perhaps America would not have suffered much of the environmental degradation and the ugliness that it now endures.

9. See, e.g., DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* ch. 10 (2d ed. 1986); JULIAN C. JUERGENSMEYER & JAMES B. WADLEY, *FLORIDA LAND USE AND GROWTH MANAGEMENT LAW* ch. 2 (1975) (looseleaf text with annual supplementation). I have even left the discussions of it to my co-author in a forthcoming text. JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* (forthcoming 1998).

10. See HAGMAN & JUERGENSMEYER, *supra* note 9, at 324.

Why then am I going to break my silence? Arguably, I am not because this essay isn't about an act covering *regulatory takings*; instead, it is about an act which creates a brand new cause of action providing compensation for government regulations which create an "inordinate burden" on real property.¹¹ However, since I believe the difference between compensation for takings and compensation for inordinate burdens will prove to be a distinction without a difference, I felt compelled to begin with the apologia the reader has just endured.

II. THE BERT J. HARRIS, JR., PRIVATE PROPERTY RIGHTS PROTECTION ACT

The Property Protection Act¹² is well drafted and succinctly and clearly states its intended effect:

When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property

11. See FLA. STAT. § 70.001(3)(e) (defining the term "inordinate burden").

12. It should be noted that the Legislature enacted two acts which relate to the effect of land use regulations on an owner's property rights. They have been combined into a new chapter of the Florida Statutes with the far from neutral title "Relief From Burdens On Real Property Rights." FLA. STAT. ch. 70 (1995). The first act and the subject of this essay is the "Bert J. Harris, Jr., Private Property Rights Protection Act." FLA. STAT. § 70.001(1995). The second act is the "Florida Land Use and Environmental Dispute Resolution Act." FLA. STAT. § 70.51 (1995).

The second act is basically the product of Governor Chiles' Private Property Rights Study Commission and was envisioned by that Commission as the legislative response to the taking issue controversy. Its self-stated purpose is:

Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of his real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section.

FLA. STAT. § 70.51(3). Enactment of the two acts indicates: [please choose one] a. confusion, b. the desire of the Legislature to please everyone, c. neither of the above. This is a trick question because the Legislature explained (?) the relationship of the two acts in the third section of Chapter 70:

It is the express declaration of the Legislature that ss. 70.001 and 70.50 [sic] have separate and distinct bases, objectives, applications, and processes. It is therefore the intent of the Legislature that ss. 70.001 and 70.50 [sic] are not to be construed in *pari materia*.

FLA. STAT. § 70.80 (1995).

owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this [Act].¹³

The Property Protection Act also confronts head on—but doesn't necessarily resolve—the issues of how the new cause of action relates to existing takings law:

This [Act] provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. This [Act] may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking. The provisions of this [Act] are cumulative, and do not abrogate any other remedy lawfully available, including any remedy lawfully available for governmental actions that rise to the level of a taking. However, a governmental entity shall not be liable for compensation for an action of a governmental entity applicable to, or for the loss in value to, a subject real property more than once.¹⁴

Fortunately, there is no need to give a detailed, provision by provision analysis of the Property Protection Act because two articles published in the *Florida State University Law Review* have already done so. Those articles represent opposing viewpoints of the act. The "favorable" view is presented by three of the drafters of the Property Protection Act—David L. Powell, Robert M. Rhodes, and Dan R. Stengle.¹⁵ A considerably less favorable view, as the title indicates, is presented by S. Lazos Vargas.¹⁶ The reader is urged to consult these

13. FLA. STAT. § 70.001(2) (1995).

14. FLA. STAT. § 70.001(9) (1995). The issue has been raised in pending litigation as to whether or not the Legislature has attempted (improperly) to amend the Florida constitution by lowering the standard for obtaining just compensation from a "taking" to an "inordinate burden." Ronald L. Weaver, *1997 Update on the Bert Harris Private Property Protection Act*, FLA. B.J., Oct. 1997, at 70, 72.

15. See David L. Powell et al., *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255 (1995).

16. See Sylvia R. Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315 (1995).

two articles,¹⁷ and the Property Protection Act itself, for details of how the act is supposed to function from a procedural standpoint.

Two comments should be made at the outset which will hopefully temper many of the negative observations contained in this essay about the Property Protection Act. First, the Florida Legislature did not act in a vacuum. The passage of legislation to "solve" or at least alleviate the burdens landowners allegedly suffer from environmental and land use regulations has achieved "fad" status throughout the country. In the past couple of years, at least seventeen other state legislatures have enacted legislation of some type designed to "relieve the burden of property owners."¹⁸

Second, the Property Protection Act was the product of a carefully crafted compromise.¹⁹ The act at least temporarily staved off the attempts of property rights protection forces to amend the Florida Constitution or legislatively enact a devastating—to environmental and land use regulation—provision for compensation of any land owner whose property is damaged by any exercise of the police power.²⁰

17. There are also other discussions of the act available including one following this essay. Roy Hunt, *Property Rights and Wrongs: Historic Preservation and Florida's 1995 Private Property Rights Protection Act*, 48 FLA. L. REV. 709 (1996); see also Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?*, 12 J. LAND USE & ENVTL. L. 247 (1997); Patrick W. Maraist, *A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Rights Protection Act*, 47 FLA. L. REV. 411 (1995); Weaver, *supra* note 14, at 70.

18. See Robert H. Freilich, *What's Wrong with Takings Law: Is Takings Legislation Necessary?*, Videotape of Rocky Mountain Land Use Institute Presentation (Mar. 13, 1997) (on file with author).

19. The most frequently repeated phrase of the act's sponsors during the legislative debates in the House was "this is a carefully crafted piece of legislation." Tape of Legislative Debates for H.B. 863, held by Florida House of Representatives (May 1-2, 1995) (on file with author). Tapes of the discussion are recommended as a real treat to students of the legislative process.

20. See Vargas, *supra* note 16, at 315 n.4 (discussing the proposed constitutional amendment and a discussion of it and its fate in *League of Women Voters v. Smith*, 644 So. 2d 486 (Fla. 1994)).

Should the fact that I strongly believe that the compromise was "good" for the public interest deter me from criticizing the act? I think not. I am an academic not a politician. Even though as a citizen of the State of Florida I may be grateful for the compromise I am writing this essay from an academic and not a practical perspective. The primary role of an academic is to give pure analysis—not practical perspective. If those who pay us totally dismiss our ideas—that is their prerogative and neither should they be offended by our criticism nor we offended by their rejection of it.

III. WHY SHOULD THE FLORIDA LEGISLATURE LEGISLATE GREATER PROTECTION TO LANDOWNERS THAN THE COURTS GIVE THEM?

What is wrong with takings law as the courts, federal and state, have developed it since Justice Holmes' *Pennsylvania Coal* decision started us on our Grail-like search²¹ for the meaning of TOO FAR? The nicest thing that members of the legal community say about takings jurisprudence is that it is a "muddle."²² Private property rights hawks say unprintable things about takings jurisprudence. We are generally so proud of our legal system that at times we are guilty of pure ethnocentrism when we describe or evaluate it. How can we explain that our legal system has failed so badly to protect private property through application of the property protection provisions of our Constitution that state legislatures must now rush in to rescue the owners of land from the clutches of their elected officials?

Have the courts failed so badly? If so, how did it happen? Again we can begin by blaming Holmes, who confused two governmental powers and tried to place two very different concepts on a spectrum.²³ But Holmes does not merit all of the guilt. Perhaps the worst problem is that nearly all of the thousands of judges, law professors, lawyers, and politicians who have set forth in a quest for understanding the issue have sought to define the wrong term. The courts, and now many legislatures, concentrate on finding a definition of "taking." Shouldn't they strive for a definition of "property" first? How can we discuss how "something" is "taken" if you don't first identify the "something?"

One of the few Supreme Court cases which has really paid attention to the need for defining property is *United States v. Willow River Power Co.*²⁴ In *Willow River*, Justice Jackson said "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."²⁵ Perhaps this "definition" is laughable

21. When I retire I want to re-shoot two movies for the legal profession: (1) Monty Python and the Holy Grail in which the actors will search for the definition of "taking" and (2) Jurassic Park—renamed Juristic Park—a theme park in which the lawyer tourists will be able to witness common law property concepts such as the destruction of contingent remainder and the execution of Uses.

22. See Carol M. Rose, *Mahon Reconstructed: Why the Taking Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984).

23. See *Pennsylvania Coal*, 260 U.S. at 413 (discussing property rights in relation to the police power).

24. 324 U.S. 499 (1945).

25. *Id.* at 502.

for its circularity and therefore meaningless. Maybe it is impossible to define "property" just as it has proved impossible—at least for the courts—to define "taking." But then maybe Justice Jackson really sees the point clearly—"property" has no fixed meaning but is ever changing.²⁶ Maybe the whole idea of property is that it serves a social function and therefore property rights can only be defined at a given place and at a given time and in our system. Therefore, the judiciary is given the responsibility for deciding on an ad hoc basis when the responsibilities of land ownership should permit government regulation and when the rights of ownership should prevent such regulation.

Is the social function analysis just given my (choose one) [(1) crazy, (2) brilliant] idea? Of course not. It is the most widely held view of property rights in the world, and one that has been articulated in civil law jurisprudence, thanks to Leon Duguit, as the social function theory of property.²⁷ I maintain that it is the essence of common law property going back to 1066 (or shortly thereafter) in that it well describes the common law concept that ownership consists of both "rights" and "responsibilities."²⁸

One thing that has always puzzled me when I have contemplated the takings issue from a global perspective is why "takings" is almost exclusively an obsession of the American legal system and society.²⁹ Can we dismiss the question—as I have heard it done—with answers such as: "We have the 5th amendment—they don't." Or "We love and protect private property and that country doesn't." Or the responses given before the Fall of the Wall: "Those [choose one or more] Brits, Canadians, Germans, etc. are really 'commies.'" Do politicians, citizens, land owners, etc. in those countries really "love" private property less? From a economic standpoint, are the profits gleaned from land development less excessive than in this country? Do property owners in "that" country end up less well off in terms of their total property value package?

26. See *id.* ("[A] closed catalogue of abstract and absolute 'property rights' . . . is not in this day a permissible assumption").

27. See Julian C. Juergensmeyer, *The American Legal System and Environmental Pollution*, 23 U. FLA. L. REV. 439, 447-48 (1971).

28. See *id.* at 447 (stating the social function theory of property is closely akin to the "theory of ownership of land in the common law").

29. Takings cases, articles, books, and conferences are virtually nonexistent in a country as near and similar as Canada, where one of the few articles discussing the issue refers to it as "Exotic Expropriation." See R.J. Bauman, *Exotic Expropriations: Government Action and Compensation*, 52 ADVOC. 561 (1994). Is there any issue less exotic and more common place in American law?

I'll admit I don't have clear answers to all of the questions just posed. However, what is clear is that the taking issue is not a similar "problem" outside our borders, and the courts in other countries play a very minor role on this point.³⁰ Why? Generally in other countries there is at least a relatively well established view that property serves a social function and that it is the role of the Legislature—Parliament in most countries—to decide, when they enact a regulatory measure, whether and how compensation is to be paid to those who lose economic value through the application of the regulatory measure. If I am correct in this analysis, can we view the enactment by the Florida Legislature of the Property Protection Act as a movement toward legislative and not judicial determination of the compensation—definition of property—issue? Is this a role the legislature can realistically or constitutionally play in our separation of powers/legislative supremacy system?

IV. WHAT HATH THE FLORIDA LEGISLATURE WROUGHT

Whatever your view of property rights, takings, and related issues, does the Property Protection Act do anything good?³¹ Does it do anything bad?

For actions brought under the act, we no longer argue over the meaning of "taking of property." Instead, we argue over the meaning of "inordinate burden." Since the "muddle" that has been produced by our courts in their attempt to define "taking" has only been alluded to, the reader will need to take his own favorite definition of "taking of property" and compare it to the statutory definition of inordinate burden:

The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable

30. See J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 106-10 (1995); K. Richter, *Compensable Regulation in the Federal Republic of Germany*, 5 *ARIZ. J. INT'L & COMP. L.* 34 (1988); see also *TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* (David L. Callies ed., 1996) (containing several articles discussing the takings issue in other nations).

31. One "good" that does seem to be accomplished is that the ripeness issue that is a part of the takings exercise is clarified in favor of the landowner by the Property Protection Act's requirement that the governmental entity accused of inordinately burdening property rights must issue a ripeness "certificate" early in the controversy. See *FLA. STAT. § 70.001(5)(a)* (1995); see also Maraist, *supra* note 17, at 415. The issue must be raised, however, as to whether this is a legislative invasion of the judicial prerogative to determine ripeness?

to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms "inordinate burden" or "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.³²

Because of the vague and expansive language in this definition, it will be uncertain how a court will interpret and apply this definition. The "principles" given in the act for determining the award of compensation seem to be an essential part of the inordinate burden concept:

The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity or entities.³³

Sound familiar? The statute contains traditional takings concepts in spite of the previously indicated legislative disclaimer of the relevance of takings jurisprudence.

Will "muddleness" be the result of judicial interpretation here too? Since no court interpretations of the Property Protection Act are available we can only speculate. Is inordinate burden clearer, i.e., easier to define and apply than "taking?" It isn't to me. But I'll now reveal the fact that I don't think the courts have ever been serious about defining

32. FLA. STAT. § 70.001(3)(e) (1995).

33. FLA. STAT. § 70.001(6)(b) (1995).

"taking" nor do I think they should be. Law is similar to a game or an art, not a science. The common law is notorious for being unable and uninterested in defining important terms.³⁴ Our concept of law is that it should develop by example (on an ad hoc basis) and not by definition.³⁵ Definitions are confining and destructive of the flexibility that distinguishes our approach to law.

When the courts get through with defining "inordinate burden" will it be clearer, less ad hoc, and give greater predictability to the outcome of controversies than does the "takings" concept? I think not. I am not suggesting that the Property Protection Act has no meaningful effect or makes no change in the balance between regulation and property rights. The Legislature has communicated a clear concept to the courts: property owners complaining of environmental and land use regulation should get compensation more frequently than they have in the past.³⁶ Not only is the Legislature making clear that landowners are to "win" more often but the Property Protection Act sets up procedures for landowner/governmental entity mediation/negotiation designed to get the controversy resolved outside the regular judicial system.³⁷ If a controversy does reach a court, the governmental entity has lost its ripeness defense and already had to show its flexibility in its settlement offer.³⁸ Whether the concepts inherent in the Property Protection Act get "muddled" or not, it will suffice, and in fact already has sufficed,³⁹ to scare many governmental entities regulationless!

V. INORDINATE BURDENS ON THE PUBLIC INTEREST

I think the Property Protection Act inordinately burdens the public interest from a pro-environmental protection and land use planning perspective. First, in spite of all of the rhetoric to the contrary, I believe that takings jurisprudence has allowed a system to develop whereby we have been able to do a reasonable amount of land use planning and environmental protection without totally restricting the use of land. Is our system perfect or even good from an environmental/land use planning perspective? Definitely not. Even now many governments

34. May I remind property lawyers of the term "seisen." Ever succeed in defining it?

35. See *Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In that case, the United States Supreme Court admitted that the taking issue is determined on an ad hoc basis. *Id.* For those who yearn for certainty this can be emotionally devastating but for those who value flexibility and freedom from dogma it is exhilarating.

36. See FLA. STAT. § 70.001(1) (1995) (stating that the act is intended to create a new cause of action).

37. FLA. STAT. § 70.001(4) (1995).

38. FLA. STAT. § 70.001(4)-(5) (1995).

39. See Hunt, *supra* note 17, at 718.

refrain from the degree of planning and environmental protection that is needed because they fear having their regulations struck down by the courts.⁴⁰ Is our system perfect or even good from a landowner's perspective? Of course not. It is human nature to want to make as much money from land as the market will permit. Many landowners feel devastated by any government action that lowers their profits, but never bother to write thank you notes, of course, for those government actions that increase their profits or values. But at least the takings concept—although I believe it was totally misdirected at its conception and birth—has allowed the judiciary to redefine the social function that property serves in balancing—imperfectly of course—the rights and responsibilities of ownership. Could the takings concept ever be more definite or better defined? Probably not. When the legislative branch invades the role of the judicial branch the delicate truce is destroyed because the Property Protection Act is an attempt to give the upper hand to the land owners.

The second inordinate burden on the public interest that stems from the Act is the freeze on government regulatory activity that is "suggested" by the Act.⁴¹ Regulations pursuant to ordinances and plans in effect on May 11, 1995, are exempted from the effect of the act⁴²—i.e. no new remedy of compensation for inordinate burdens resulting from such measure is available.⁴³ Only takings claims are available to land owners affected by those measures. Thus the vulnerability of governmental regulations to compensation claims is quite different depending on whether the local government got its act together before or after the magical date. At the same time the Legislature has left intact the mandatory planning, consistency, and concurrency requirements placed upon local governments by the Local Government Comprehensive planning and Land Development Regulation Act⁴⁴ and related acts. Yet the potential vulnerability of local governments to compensation claims in connection with such planning requirements depends on the date of their plans and ordinances.

40. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2321-22 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031-32 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987).

41. See FLA. STAT. § 70.001(1) (stating the general goal behind the act is to compensate property owners who are unfairly affected by a new law, rule, regulation, or ordinance).

42. FLA. STAT. § 70.001(12) (1995). This was the day the 1995 legislature adjourned. A bill was introduced in the 1997 Florida legislative session to roll back the date from 1995 to 1990. See S.B. 1146 (Fla. 1997). The bill did not pass. So much for a carefully crafted compromise!

43. Exactly what is exempted is another problem with the Property Protection Act.

44. See FLA. STAT. §§ 163.3161-.3243 (1995).

How can one describe the planning and land use regulatory system in Florida after the Property Protection Act? Try this: Florida has a strong system of environmental and land use regulation based upon two dominant principles: (a) Local government land development regulations must implement and be consistent with local government comprehensive plans which are consistent with regional policy plans and the Florida State Comprehensive Plan all of which contemplate a strong system of regulation to further the public interest, and (b) local governments must make their land development decisions compatible with the principle of concurrency, i.e., that infrastructure to service new development must be available concurrently with the creation of demand for such infrastructure by the new development or otherwise new development must not be permitted.⁴⁵ The vulnerability of having to pay compensation to landowners whose land values are inordinately burdened by any of the regulations imposed pursuant to the consistency and concurrency principles depends on whether the governmental entities enacted those regulations before May 11, 1995, or afterwards.⁴⁶

Does this make sense? Is it constitutionally permissible for the Legislature to require regulation by local governments but then to create a cause of action that imposes liability, unfunded by the Legislature of course, for complying with legislative mandates?

The third inordinate burden on the public interest stems from the Property Protection Act's attempts to authorize settlement agreements that have the effect of repealing or at least modifying existing law.⁴⁷ The extent to which settlement agreements can violate the law is a troublesome issue throughout our legal system and one which is inadequately analyzed by most courts⁴⁸ and commentators, but the issue manifests itself quite starkly in the following portions of the Property Protection Act:

45. FLA. STAT. § 163.3161 (1995).

46. FLA. STAT. § 70.001(12) (1995).

47. FLA. STAT. § 70.001(4)(d) (1995).

48. The issue may not be ignored much longer. In a recent decision of the Second District Court of Appeal, the court affirmed the trial court's action vacating a stipulated final judgment. *Chung v. Sarasota County*, 686 So. 2d 1358, 1358 (Fla. 2d DCA 1996). The court stated:

We conclude that the County's settlement agreement here presents a case of improper contract zoning. Although the County Commission approved the settlement at its regular meetings, it bypassed the more stringent notice and hearing requirements for a rezoning. When it entered into the settlement agreement that obligated it to rezone Chung's property, the County contracted away the exercise of its police power, which constituted an ultra vires act.

Id. at 1360. The court certified the question to the Florida Supreme Court. *Id.* at 1361.

(d)1. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

2. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.⁴⁹

Can the State legislature authorize the courts to “repeal” or substantially modify laws enacted by local governments? The above quoted portions of the Property Protection Act cleverly purport to protect the public interest by requiring the property owner and the governmental entity to get circuit court approval of the agreement. However, the party omitted is the public which in theory had input during the enactment of the ordinances and regulations being modified or ignored. Surely, there are constitutional issues raised by such an attempt. If not, the citizenry may be up in arms that the legislative product coming from its elected officials after public notice, hearings, and debate can be easily thwarted.

VI. CONCLUSION

We can hardly blame the Florida Legislature for succumbing to the takings legislation fad. We should probably even laud them for not trying to set some arbitrary percentage definition of takings vis-à-vis land value before the regulation. But, we must ask, is the Property Protection Act the death knell for further growth management in this State? Will the fear of having to pay compensation prove to be an effective barrier to further attempts at controlling growth and preserving our fragile environment?

49. FLA. STAT. § 70.001(4)(d) (1995).